

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FONG YOU TUN and FONG YOU FOOK,
Appellants,
vs.

JOHN D. NAGLE, as Commissioner of Im-
migration for the Port of San Francisco,
Appellee.

BRIEF FOR APPELLEE

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No. 4039

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STATEMENT OF FACTS.

The facts in this case are that on November 26, 1907, Fong Foo, the alleged father of applicant Fong You Fook, left this country on a visit to China, returning to the United States on January 22, 1910. It thus appears he was in China at the most for a period of two years. The claim is made that two of the three boys who sought admission as his sons were born while he was in China and the third shortly after his return. All three are alleged to be full

brothers born of a mother past 47 years of age at the time of the birth of the eldest of the three. The youngest of the three boys was landed, the eldest was excluded and deported, the third applied to the Court to obtain admission and is appealing from the decision of the District Court upholding the excluding decision of the Immigration authorities. The claim made is that he was denied admission on the same evidence upon which the youngest was admitted.

The fact is that the testimony of the alleged father, the applicant and Fong You Tun, the landed son, is to the effect that the paternal grandmother, whose name is said to be Ng Shee, of the age of 80 years, is alive and residing in the house in China from which the boys have just come. Further they state that the village from which they came is said to have only two houses, one occupied by themselves and the other by one Fong Sue Ngee whose wife is said to have died last year. Fong You Mun, the one excluded and deported, states that the paternal grandparents are dead and that he has never seen his paternal grandmother, and that he never saw the wife of Fong Sue Ngee. These two conflicting statements in the testimony of the alleged sons are merely two instances of discrepancies in the record concerning matters about which they could not be presumed to be mistaken.

The cases of Fong You Fook, Fong You Mun and Fong You Tun were regularly heard and decided by

the Immigration authorities at the port of San Francisco and from the adverse findings of the port officers appeal was taken to the Secretary of Labor. The Secretary on first consideration of the evidence sustained the findings of the port officers and ordered the three applicants excluded. Three days later, the Secretary amended his decision and ordered the admission of Fong You Tun, the youngest of the applicants, and ordered the exclusion of the other two. It is conceded by counsel that the exclusion of applicant Fong You Mun was entirely proper, it appearing that there were material discrepancies between his testimony and that of his alleged brothers and alleged father. Counsel contends that the hearings accorded Fong You Fook were unfair for the reason that no evidence was introduced to disprove his claim and secondly that the Secretary admitted Fong You Tun on the *identical evidence* on which he excluded Fong You Fook. The question therefore is, did the Immigration authorities deny the admission of Fong You Fook on the identical evidence on which they admitted Fong You Tun?

ARGUMENT.

The hearings before the Immigration officials were fair and the findings thereon are supported by the evidence.

Manifestly the decision of the Secretary was unfair, if as counsel contends, it was predicated on the same and identical evidence in each case, and it is

on this contention that the case must stand or fall. It is pertinent then to examine the record to determine why the Secretary, after first entering a finding, excluding Fong You Tun, later rendered a finding granting him admission. The Secretary's reasons are set forth in report of March 5, 1923 (Ex. A), reading as follows:

“The Board of Review, after again going over his file is inclined to believe that the relationship, so far as Fong You Tun is concerned, may be regarded as reasonably established. He is only twelve years of age, and a review of his testimony shows that he has made a satisfactory and willing witness and has testified in an apparently frank manner. His statements, in all material respects, are in agreement with those of his alleged father. They disagree with those of one of his alleged brothers, Fong You Mon, in some essential particulars, but it is believed that these disagreements, *so far as he is concerned, may be overlooked*, in view of the features already set forth and the fact that there is a striking and convincing resemblance between him and his alleged father. *The resemblance is regarded as very significant and as indicating a probability that this applicant is the son of Fong Foo.*”

In the determination of relationship physical comparisons between persons claiming kinship is competent and material evidence.

His Honor, Judge Dietrich, in the case of *Ex Parte Chooy Dee Ying*, 214 Fed. 873, said:

“It cannot be doubted that such comparison is competent and may disclose most convincing evidence of kinship, especially where the relationship is that of father and son.”

Numerous cases in point have been before the State Courts, as follows:

State vs. Woodruff, 67 N. C. 89-92

Gaunt vs. State, 50 N. Y. Law. 490

Jones vs. Jones, 45 Md. 144 (152)

State vs. Saidell, 70 N. H. 174, 176

State vs. Danforth, 73 N. H. 215

State vs. Smith, 54 Iowa, 104, 105

Finnegan v. Dugan, 14 Allen, 96 Mass. 197

In Re Jessup, 81 Cal. 408-418

Kelly v. State, 133 Ala. 195-198

Gilmanton v. Ham, 38 N. H. 108-113

Douglass Peerage case, 2 Harger Collect Jurid
402

2 *Wigmore on Evidence*, 1150-1154, and

Ex parte Chooey Dee Ying, 214 Fed. 873,

from which the following language is quoted:

“Physical comparison between applicant and father is competent and material evidence.”

Thus it is disclosed by the Court that the Secretary did have before him evidence in the case of Fong You Tun sufficient in his opinion, to turn the scale in favor of his admission. No such evidence existed in favor of appellant herein.

The record discloses that fabricated testimony had been introduced which put the whole case of the parties on whose behalf it was offered under suspicion and which caused the Secretary to reject the testimony offered to establish the claimed relationship. In *Soo Hoo Doo Hon vs. Johnson*, 281 Fed. 870, the Court said:

“Proof that fabricated testimony has been introduced does much more than merely discredit the witness involved; it puts the whole case of the party on whose behalf it was offered under suspicion. In this instance the immigration tribunals were quite within their rights in rejecting the testimony of both the applicant and his alleged father, and it does not seem to me that under the circumstances disclosed they acted arbitrarily and unfairly in refusing to accept the testimony of the other witnesses as establishing the applicant’s parentage as claimed by him.”

Also the following language found in the case entitled *Wong Foo and Wong Ding*, Dist. Court No. 15984 is pertinent here:

“If an alien, domiciled here, attempt to perpetrate a fraud upon the Government, he is not in a position to complain, if later claims by him supported chiefly by his own statements and that of another who participated in the fraud, are rejected. Counsel calls this penalizing him. But while it may have that effect such effect is incidental. The real fact is that his statements and the statements of such other are so discred-

ited that reliance cannot be placed therein. Any other rule, except that based upon the good faith of the domiciled alien and the sons that he brings into the country would place a premium on perjury.”

Notwithstanding the fact that the Immigration authorities were convinced that the case of Fong You Mun was fraudulent and that the others claiming to be members of the same family were parties to the fraud, and that suspicion and doubt as to the existence of the claimed relationship of Fong You Fook and Fong You Tun immediately arose, notwithstanding this, however, an examination and comparison of the photographs of Fong You Tun and of his alleged father Fong Fook brought to the Secretary the conviction that the two were nevertheless father and son, and thus the finding that “the disagreements, so far as this applicant is concerned, will be overlooked in view of the striking and convincing resemblance existing between them.” Whether the Secretary was right or wrong in reaching this conclusion is immaterial.

This Court speaking through his Honor Judge Morrow, in *White vs. Gregory*, 213 Fed. 768, says:

“In reaching this conclusion the officers gave the aliens the hearing provided by the statute. This is as far as the Court can go in examining such proceedings. It will not inquire into the sufficiency of probative facts, or consider the reasons for the conclusions reached by the officers.”

Because of the character of the evidence and the contradictions and discrepancies therein the Secretary of Labor was called upon to exercise his discretion in a determination of the matter before him.

“The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. Abuse of discretion and especially gross and palpable abuse of discretion, which terms are ordinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 N. Y. 418, 431.”
1 C. J. 372.

It appears from the record that the Secretary took pains to do these applicants full justice for after his decision had been rendered, the record was again gone over and it was then discovered that the applicant Fong You Tun bore a strong resemblance to his alleged father. It appears, however, that his review of the record did not lead him to reverse his finding as to the other two applicants.

The remarks in *Chin Yow vs. United States*, 208 U. S. 8, 11, are in point to meet the contention of counsel that no evidence was introduced to disprove Fong You Fook's claim. It is there said:

“It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. And by

way of caution, we may add that jurisdiction would not be established simply by proving that the commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced.”

In the exercise of his discretion the Secretary decided the case in favor of one and against the other two applicants. There being evidence to support the findings, his decision is not subject to judicial review under the well settled rule that courts cannot review an order of the Immigration authorities excluding a Chinese person where there is any evidence to support the decision.

Ex Parte Ng Kwack Kang, 233 Fed 478

Frick vs. Lewis, 195 Fed. 693

Ex Parte Kusuki Sata, 215 Fed. 173

U. S. vs. Howe, 235 Fed. 990

Ex Parte Chin Doe Tung, 236 Fed. 1017

Lam Fung You vs. Frick, 233 Fed. 393

It is contended that the Secretary of Labor in the present case acted within the scope of the discretionary powers committed to him. Such being the case his order, within the authority of the statute, is final.

It is therefore respectfully submitted that the hearings accorded Fong You Fook were regular and fair in all respects, and that the decision of the Secre-

tary of Labor excluding him from admission to the United States is supported by the evidence.

Dated: San Francisco, California,
October 31, 1923.

Respectfully submitted,

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